BANK BUMIPUTRA (M) BHD.

v.

PERBADANAN KEMAJUAN NEGERI PERAK

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 21-260-86]
31 DECEMBER 1988

BANKING: *Whether defendants guarantors and/or principal debtors - Principal sum payable from date of demand or date of guarantee - Rate of interest.*

This was an appeal against the decision of the learned Senior Assistant Registrar on 29 January 1988 allowing the plaintiffs' application for final judgment for RM1,460,431.94 with interest at 14.25% per annum with costs from 1 October 1986.

The defendants had given a letter of guarantee to plaintiffs for credit facilities advanced to Elite Wood Products Sdn. Bhd. up to the sum of RM1,550,000 with interest.

The defendants raised the following issues:

(a) whether the defendants are guarantors and/or principal debtors;

(b) is the principal sum of RM759,500 payable from the date of demand or the date of guarantee;

(c) whether interest is payable from the date of demand or the date of guarantee;

(d) what is the rate of interest;

(e) whether reliance can be placed on the certificate at encl. 17;

(f) in order to construe the guarantee, evidence of surrounding circumstances must be adduced and this had not been done.

Held:

[1] In view of clause 10 of the letter of guarantee the defendants are guarantors as well as principal debtors.

[2] In view of clause 1 of the letter of guarantee the principal sum and interest are payable from the date of the guarantee.

[3] In view of clause 1(ii) the interest rate is to be determined from time to time.

[4] The certificate in encl. 17 is in order.

[5] Court concurs with the findings of the Senior Assistant Registrar and appeal dismissed with costs.

Cases referred to:

Dobbs v. The National Bank of Australasia Ltd. [1935] 53 CLR 643

Bache & Co. (London) Ltd. v. Banque Vernes Et Commerciale De Paris SA [1973] 2 Lloyd's Rep 437

Citibank N.A. v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282

For the plaintiff - Shamsul Bahrain; M/s. Skrine & Co.
For the defendant - N.T. Rajah; M/s. Maxwell Kenion Cowdy & Jones

JUDGMENT

Abdul Malek Ahmad J:

The defendants had appealed against the decision of the learned Senior Assistant Registrar given on 29 January 1988 allowing the plaintiffs' application for final judgment for RM1,460,431.94 sen with interest at 14.25% per annum from 1 October 1986 with costs, and had also applied for an order that all execution and further proceedings following that order be stayed pending further order or disposal of the said appeal. After hearing arguments from Counsel for both parties and considered the affidavits and authorities, I had dismissed the appeal with costs but had, as Counsel for the plaintiffs had no objections, allowed a stay of execution pending appeal to the Supreme Court.

Before me, Counsel for the defendants had raised the following triable issues:

(a) whether the defendants are guarantors and/or principal debtors;

(b) is the principal sum of RM759,500 payable from the date of demand or the date of guarantee;

(c) whether interest is payable from the date of demand or the date of guarantee;

(d) what is the rate of interest;

(e) whether reliance can be placed on the certificate at encl. 17;

(f) in order to construe the guarantee, evidence of surrounding circumstances must be adduced and this had not been done.

All these issues fall back on the letter of guarantee given by the defendants to the plaintiffs on 23 February 1982 for credit facilities advanced to Elite Wood Products Sdn. Bhd. (hereinafter "EWP") up to the sum of RM1,550,000 with interest as stated. The Court has examined this letter of guarantee and is of the view that the defendants are guarantors as well as principal debtors in view of clause 10 which reads:

> 10. As a separate and independent stipulation I/We agree that all sums of money not recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the borrower or any other fact or circumstance and whether known to you or not shall nevertheless be recoverable from me/us as a principal debtor or debtors in respect thereof and shall be repaid by me/us seven days after demand in writing made by you or on your behalf.

The Court also finds that the RM759,500 which has been admitted by the defendants is payable from the date of guarantee in view of clause 1 and this applies to the interest as well. It is true that it is payable only on demand being made but where, as in this case, demand has been made, the amount payable runs back from the date of the guarantee. Clause

1 of the letter of guarantee states:

> 1. I/We will pay you on demand as follows:
>
> (i) the sum of Ringgit: Seven Hundred and Fifty Nine Thousand and Five Hundred Only* (RM759,500)* (hereinafter called "the guaranteed sum") and any part of the moneys hereby guaranteed which is now or shall at any time be owing or remain due and unpaid to you from the borrowers.
>
> (ii) interest at the rate of TR - 11.0% per annum LC - ABM Rate FBEP/FBEP(AP) - ABM per annum or at such other rate as may be determined by the bank from time to time.
>
> (iii) commission and other expenses and all cost charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any part of the moneys hereby guaranteed and to make good any default by the borrower or its successors-in-title in payment of the sum hereby guaranteed or any part thereof.

As regards the interest rate, the Court holds that the guarantee is clear that it is fluctuating and is to be determined by the plaintiffs from time to time in view of clause 1(iii).

The Court also holds that the certificate at encl. (17) by the manager of the plaintiffs as regards the amount owing as at 30 September 1986 is in order following clause 6 of the letter of guarantee as well as several case authorities on this point. Clause 6 of the letter of guarantee is reproduced for ease of reference:

> 6. Any accounts settled or stated by or between you and the borrower or admitted by or on behalf of the borrower and duly certified by one of your officers may be adduced by you and shall in that case be accepted by me/us as conclusive evidence that the balance or amount thereby appearing is due from the borrower to you and payable on demand by me/us.

It is relevant at this point to refer to *Dobbs v. The National Bank of Australasia Ltd.* [1935] 53 CLR 643. In that case, a clause in a guarantee given to a bank provided that a certificate signed by the manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date. It was held that the ousting the jurisdiction of the Court and was therefore not void and that a certificate given pursuant to that clause was conclusive upon the parties of the amount and existence of the principal debtor's indebtedness.

In *Bache & Co. (London) Ltd. v. Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Rep. 437 the plaintiffs, commodity brokers on the London Commodity Exchange, demanded a bank guarantee before entering into buying and selling transactions on behalf of their customer, a French trading company. The defendants, who were the trading company's bankers, gave the guarantee which contained a conclusive evidence clause providing that the amount stated in the notice of default shall be conclusive evidence of the amount claimed. Lord Denning MR stated in his judgment that

> this commercial practice of inserting conclusive evidence clauses is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted so much so that a notice of default given by a bank or a broker must be honoured.

Raja Azlan Shah, CJ (Malaya) (as then was) in the Federal Court case of *Citibank NA v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282 had concluded his judgment by saying, with particular reference to both the *Dobbs'* and *Bache's* cases, as follows:

That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC O. 14 procedure. We have often said in this Court many time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the Judge-in-chambers, or, for that matter this Court, shall not deal with the whole matter under the RSC O. 14 procedure. In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus:

> A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.

It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the assistant vice-president of the branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

As gathered from the pleadings and affidavit evidence, the Court has also been able to construe the letter of guarantee in its surrounding circumstances. It particular, the affidavit of the branch manager of the plaintiffs (encl. 3) dated 22 January 1987 had stated that the plaintiffs had made a demand by letter dated 14 April 1986 and through their solicitors by letter dated 16 May 1986. The same deponent had also by affidavit dated 30 April 1987 (encl. 7) had given the detailed calculations of the judgment debt. By encl. 17, the same deponent had attached as Exhibit "AB11" the certificate dated 7 January 1988 as to the amount of money owing to the plaintiffs by the defendants as at 30 September 1986.

In their statement of defence filed on 21 February 1987, the defendants had admitted that they acted as guarantors for EWP up to RM759,500 by virtue of the letter of guarantee dated 23 February 1982 but denied they owed the plaintiffs the RM1,460,431.94 sen as at 30 September 1986 as the plaintiffs had not satisfactorily accounted for moneys paid and had not given satisfactory accounts of amounts due. They admitted receiving the notice of demand but denied they were jointly and severally liable on the said loan facilities and that they had agreed to be the principal debtors for all amounts loaned to EWP.

The defendants are at liberty to show cause against an application under O. 14 by either showing technical grounds of merits namely by showing that they have a good defence to the claim, that a difficult point of law is involved, that there is a dispute as to the facts which ought to be tried or any other circumstances showing a reasonable *bona fide* defence. None have been shown in this case and the Court is of the view that the so-called triable issues raised are not actually triable issues when considered with the terms in the letter of guarantee and the relevant case authorities. Since there is no real substantial question to be tried and no dispute as to the facts or law which raises a reasonable doubt that the plaintiffs are entitled to judgment, the Court holds that no leave to defend ought to be given to the defendants.

In the event, the Court concurs with the finding of the learned Senior Assistant Registrar and dismisses the appeal with costs.

Also found at [1989] 1 CLJ 1051